

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

DWIGHT M. DeBOSE,

Plaintiff,

v.

THIRD WATCH COMMANDER,

Defendant.

No. 2:23-cv-00131-KJM-EFB (PC)

ORDER

Plaintiff, a state prisoner proceeding pro se, has filed this civil rights action seeking relief under 42 U.S.C. § 1983. The matter was referred to a United States Magistrate Judge as provided by 28 U.S.C. § 636(b)(1)(B) and Local Rule 302.

On February 16, 2023, the magistrate judge filed findings and recommendations, which were served on plaintiff and which contained notice to plaintiff that any objections to the findings and recommendations were to be filed within fourteen days. Plaintiff has filed objections to the findings and recommendations.

In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C) and Local Rule 304, this court has conducted a *de novo* review of this case. Having reviewed the file, the court finds the findings and recommendations mostly to be supported by the record and by the proper analysis, except for its analysis of leave to amend. Although plaintiff objects to the magistrate judge's conclusion, he does not raise any arguments in support of his position other than those addressed

1 by the findings and recommendations. He does not contend the PREA creates a private cause of
2 action, nor point to a constitutionally protected interest he was deprived of without sufficient
3 process. In non-legal language, this means the laws plaintiff cites do not allow him to bring a
4 lawsuit based on the facts he alleges. As a result, his complaint must be dismissed.

5 However, the court disagrees with the magistrate judge's conclusion that amendment
6 necessarily would be futile. To be sure, plaintiff does not claim he is a victim of a sex act by a
7 correctional officer or that a correctional officer failed to protect him from a sex act, as would be
8 required for an Eighth Amendment claim. *See Reed v. Racklin*, No. 17-0799, 2017 WL 2535388,
9 at *2 (E.D. Cal. June 12, 2017) (permitting an Eighth Amendment claim to proceed after
10 screening, while dismissing PREA claim); *see generally Schwenk v. Hartford*, 204 F.3d 1187,
11 1196–97 (9th Cir. 2000) (summarizing caselaw on Eighth Amendment liability for sexual
12 assault). The magistrate judge appears to recommend dismissing the complaint without leave to
13 amend on this basis. *See Findings and Recommendations* at 4. However, the court cannot rule
14 out the possibility plaintiff could allege prison officials have discriminated against him on the
15 basis of sex in violation of the Equal Protection Clause of the Fourteenth Amendment. *See, e.g.*,
16 *Compl.* at 4–5, ECF No. 1 (alleging prison officials decided not to order rape kit for plaintiff);
17 *Slice v. Schweitzer*, No. 07-04-H, 2008 WL 5435338, at *7 (D. Mont. June 5, 2008) (permitting
18 after screening prisoner sex discrimination claim that prisons treated male and female inmates
19 differently). For this reason, the court **grants** leave to amend.

20 Accordingly, IT IS HEREBY ORDERED that:

- 21 1. The Findings and Recommendations filed February 16, 2023, are adopted with respect
22 to dismissing the complaint;
- 23 2. The courts **grants** leave to amend;
- 24 3. Plaintiff's amended complaint must be filed **within thirty days**; and
- 25 4. The case is referred back to the magistrate judge for further pretrial proceedings.

26 DATED: August 29, 2023.

27 
28 CHIEF UNITED STATES DISTRICT JUDGE